

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

REBECCA COUSINEAU, individually on her )  
own behalf and on behalf of all others similarly ) No. 2:11-cv-01438-JCC  
situated, )  
Plaintiff, ) ) MICROSOFT'S RESPONSE TO  
 ) ) MOTION TO SEAL  
v. ) ) **Note on Motion Calendar:**  
 ) ) August 23, 2013  
MICROSOFT CORPORATION, a Delaware )  
corporation, )  
Defendant. )

## I. INTRODUCTION

Microsoft Corporation respectfully requests that the Court enter an order directing the Clerk of the Court to leave under seal certain Microsoft confidential and proprietary information that Plaintiff submitted in support of her Motion for Class Certification [Dkt. 70], as more particularly set forth below.

On July 29, 2013, Plaintiff filed her Motion for Class Certification with supporting declarations and attached exhibits. Some of those documents include (or constitute) material designated as “Highly Confidential” or “Attorneys’ Eyes Only” by Microsoft under the November 13, 2012, Stipulated Protective Order entered by this Court [Dkt. 53] and the

1 February 1, 2013 Source Code Supplement. [Dkt. 57.] The Protective Order and CR 5(g)  
 2 together require that when a non-designating party files with the Court material that the other  
 3 party has designated “Highly Confidential” or “Attorneys’ Eyes Only”: (i) the material so  
 4 designated shall be filed under seal; (ii) the party filing such material shall move to seal the  
 5 material; and (iii) the designating party shall make the showing required by CR 5(g) for any  
 6 material it seeks to keep under seal. Consistent with those obligations, Plaintiff filed a Motion  
 7 to Seal contemporaneous with her Motion for Class Certification, and Plaintiff moved to seal  
 8 and filed under seal the following documents:

- 9 • Plaintiff’s unredacted Motion for Class Certification [Dkt. 70];
- 10 • Exhibits A, B, C, D, E, F, G, H, I, J, N, and O to the Declaration of  
 11 Rafey S. Balabanian in Support of Plaintiff’s Motion for Class  
 Certification [Dkt. 72-1-72-4, 72-7-72-20, 72-24, 72-25]. *See also*  
 12 Dkt. 74, 75, 76, 77 (“corrected” Exhibits A, B, D and N).

13 For the reasons set forth below and discussed further in the accompanying Declaration  
 14 of Cristina del Amo Casado, Microsoft has no objection to filing certain of these materials for  
 15 public record. Specifically, Microsoft has no objection to Plaintiff filing her Motion for Class  
 16 Certification for public record in unredacted form. In addition, Microsoft has no objection to  
 17 filing Exhibits E, J, and O to the Balabanian Declaration [Dkt. 72-15, 72-20, 72-25] for public  
 18 record. All of these materials discuss Windows Phone 7 location services at a high level of  
 19 generality, which mitigates their value to competitors. On the other hand, Microsoft  
 20 respectfully requests the Court to direct the Clerk to maintain all or a portion of the remaining  
 21 Exhibits under seal. As more particularly set forth in the del Amo Casado Declaration, the  
 22 materials to be sealed constitute, or discuss in detail, highly sensitive source code and product  
 23 specifications—the sort of material courts routinely seal in matters of this nature.

## 24                   II.       ARGUMENT

### 25                   A.       The Court Should Direct the Clerk to Seal Microsoft’s Confidential 26                   Information on a Showing of “Good Cause” or for “Compelling Reasons.”

27                   In general, the courts recognize a presumption of public access to judicial records.

*See, e.g., Kamakana v. City and Cnty. of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006);*

1 CR 5(g)(2). But this presumption does not apply to sealed discovery documents attached to  
 2 non-dispositive motions:

3 We have . . . “carved out an exception to the presumption of access” to  
 4 judicial records, *Foltz* [v. *State Farm Mut. Auto. Ins. Co.*], 331 F.3d [1122,] 1135 [(9th Cir. 2003)], for a **“sealed discovery document** [attached] to a **“non-**  
 5 **dispositive** motion,” such that “the usual presumption of the public’s right of  
 6 access is rebutted.” *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213  
 7 (9th Cir. 2002) (emphasis added). There are, as we explained in *Foltz*, “good  
 8 reasons to distinguish between dispositive and non-dispositive motions.” 331  
 9 F.3d at 1135. Specifically, the public has less of a need for access to court  
 10 records attached only to non-dispositive motions because those documents  
 11 are often ““unrelated, or only tangentially related, to the underlying cause of  
 12 action.”” *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104  
 13 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

14 *Kamakana*, 447 F.2d at 1179 (emphasis in original). Thus, to seal the confidential materials  
 15 filed with Plaintiff’s Motion for Class Certification, Microsoft need only show “good cause.”  
 16 Here, Microsoft provides ample cause to seal the business information at issue.

17 A different Judge of this Court has categorized a motion for class certification as a  
 18 dispositive motion and applied the “compelling reasons” standard under *Kamakana* and CR  
 19 5(g)(2). *See Kelley v. Microsoft Corp.*, No. C07-475 MJP [Dkt. No. 129] at 4 (Pechman, J.).  
 20 Microsoft does not believe Ninth Circuit authority imposes that standard; rather, the “vast  
 21 majority” of courts in this Circuit apply the “good cause” standard for sealing documents  
 22 related to class certification motions. *In re High-Tech Employee Antitrust Litig.*, 2013 WL  
 23 163779, at \*2 & n.1 (N.D. Cal. 2013). In any event, the risk of competitive harm to Microsoft  
 24 through disclosure of the confidential business information at issue satisfies the “compelling  
 25 reasons” standard. “[C]ompelling reasons’ sufficient to outweigh the public’s interest in  
 26 disclosure and justify sealing court records exist when such ‘court files might . . . become a  
 27 vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.”

*Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598  
 (1978)). *See also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.  
 2003) (when deciding whether to seal confidential materials submitted with summary  
 judgment motions, courts should consider “whether disclosure of the material could result

1 in . . . infringement upon trade secrets") (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434  
 2 (9th Cir. 1995)).

3       **B.       “Good Cause” and “Compelling Reasons” Exist to Seal Microsoft’s**  
 4       **Confidential Technical Specifications.**

5       As this Court explained in granting Microsoft’s motion to seal similar design  
 6 specifications in another case, a party seeking to file documents under seal must “provide a  
 7 specific description of documents or categories of documents the party seeks to protect and a  
 8 ‘clear statement of the facts justifying sealing and overcoming the strong presumption in favor  
 9 of public access.’” *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. 07-1121 JCC, Order  
 10 (April 28, 2009) [Dkt. No. 102] at 2 (quoting CR 5(g)(4)). Microsoft satisfies this standard  
 11 with respect to the matters it asks the Court to retain under seal.

12       Microsoft has been judicious in selecting the materials it asks the Court to seal. For  
 13 example, because the Motion for Class Certification speaks in generalities, Microsoft no  
 14 longer asks the Court to retain it under seal. *See* del Amo Casado Decl. ¶ 19. In addition,  
 15 Microsoft has no objection to unsealing (a) excerpts from the depositions of Sandeep Deo and  
 16 Shamik Bandyopadhyay (Balabanian Decl., Exs. E and O); (b) the email string attached as  
 17 Balabanian Declaration, Exhibit J; (c) portions of the Expert Report of Craig Snead  
 18 (Balabanian Decl., Ex. D); and (d) portions of the excerpts of the depositions of Adam Lydick  
 19 and Cristina del Ama Casado. *Id.*, ¶¶ 9-10, 13, 15-18. Microsoft’s request to seal focuses  
 20 primarily on protecting its functional and design specifications, as well as its source code.

21       **1.       The Information to Remain Sealed Contains Highly Confidential**  
 22       **Information Regarding Microsoft’s Location Services Functional**  
 23       **Specifications and Source Code.**

24       Plaintiff submitted confidential Microsoft materials with her Motion for Class  
 25 Certification falling into five categories: (1) functional and design specifications for  
 26 Microsoft’s Windows Phone 7 location services, *see* Balabanian Decl., Exs. A, B, C, G, H &  
 27 N [Dkt. Nos. 72-1 – 72-3, 72-17 – 72-18, 72-24; Dkt. Nos. 74, 75, 77 (“corrected” Exhibits A,  
 B, and N)]; (2) the report of Plaintiff’s expert, Craig Snead, and attached exhibits, which

1 discusses source code and attaches specifications for Microsoft's Windows Phone 7 location  
 2 services, *see* Ex. D – D-B-8 to the Balabanian Decl. [Dkt. Nos. 72-4, 72-7 – 72-14; Dkt. No.  
 3 76 (“corrected” Exhibit D)]; (3) an internal Microsoft e-mail string in which Microsoft  
 4 employees consider the best way to protect user privacy by no longer capturing identifying  
 5 information in connection with location data, *see* Ex. J to the Balabanian Decl. [Dkt. No. 72-  
 6 20]; (4) excerpts of deposition testimony of Microsoft employees about technical aspects of  
 7 Windows Phone 7 location services, *see* Exs. E, F & O to the Balabanian Decl. [Dkt. Nos. 72-  
 8 15 – 72-16, 72-19, 72-25]; and (5) Plaintiff's Motion for Class Certification [Dkt. 70].

9 Microsoft will address each category in turn.

10 ***Specifications for Microsoft's Windows Phone 7 Location Services.*** The Balabanian  
 11 Declaration and the Snead Report attach functional and design specifications, including  
 12 documents covering (a) the Windows Phone Camera application; (b) the location framework  
 13 for devices running Windows Phone 7 software; and (c) the “Orion” service that returns  
 14 location data from Microsoft's servers to users' devices running the Windows Phone  
 15 software. *See* Balabanian Decl. Exs. A, B, C, G, H & N [Dkt. Nos. 72-1 – 72-3, 72-17 – 72-  
 16 18, 72-24; Dkt. Nos. 74, 75, 77 (“corrected” Exhibits A, B, and N)]. The Court should  
 17 maintain these highly confidential documents under seal.

18 Modern smartphones use the device's location to deliver location-related services to  
 19 users. “[L]ocation data makes it possible to map and provide navigation services, to facilitate  
 20 delivery of more relevant search results, to provide information such as local movie options  
 21 and directions to the nearest coffee shop, and to help a user find nearby friends for an  
 22 impromptu get together.” Del Amo Casado Decl. ¶ 6. Microsoft's smartphone competitors—  
 23 including Apple, Google, and RIM—likewise provide location services. *Id.* Smartphone  
 24 competitors do not share technical details about their location services with each other. *Id.*

25 The specifications Plaintiff has filed with the Court “describe in detail the approach  
 26 Microsoft took in developing location services for the Windows Phone 7 operating system.”  
 27 *Id.* at ¶ 7. They reveal every detail of the development of Windows Phone 7 location services,

1 including the thought processes and observations of Microsoft employees, the company's  
 2 goals and objectives, and distinguishing features. *Id.* The specifications include flow charts  
 3 detailing how the location features function in the software—including, for example, the exact  
 4 algorithm location services use to return location results to the device—and some even  
 5 include excerpts of highly confidential source code. *Id.* The functional and design  
 6 specifications for Windows Phone 7 location services have significant competitive value. *Id.*

7 Microsoft takes precautions to keep these specifications confidential. The first page of  
 8 each set of specifications contains the following legend:

9 **Microsoft Confidential:** © Microsoft Confidential: © 2009 Microsoft  
 10 Corporation. All rights reserved. These materials are confidential to and  
 11 maintained as a trade secret by Microsoft Corporation. Information in these  
 12 materials is restricted to Microsoft authorized recipients only.

13 Del Amo Casado Decl. ¶ 8. Microsoft labeled each page of the specifications "Microsoft  
 14 Confidential." *Id.* Microsoft takes precautions to ensure these documents are not disclosed  
 15 outside Microsoft. *Id.* And even within the company, Microsoft makes location  
 16 specifications available only to a limited number of employees who have access to the  
 17 Windows Phone SharePoint site. *Id.* Only employees working in Windows Phone  
 18 engineering, or who otherwise show a need, are granted access to materials collected in the  
 19 SharePoint. *Id.*

20 ***Expert Report of Craig Snead.*** Mr. Snead's Report quotes from functional and  
 21 design specifications for Microsoft's Windows Phone 7 location service, and it attaches them  
 22 as exhibits. Del Amo Casado Decl. ¶ 11; *see* Balabanian Decl., Ex. D – D-B1 – D-B8 [Dkt.  
 23 Nos. 72-4, 72-7 – 72-14; Dkt. No. 76 ("corrected" version of report)]. Further, Mr. Snead's  
 24 report discusses in detail what he learned from reviewing the Windows Phone 7 source code.  
 25 For those two reasons, much of Mr. Snead's Report should remain under seal. Del Amo  
 26 Casado Decl. ¶ 11.

27 As explained above, the specifications on which Mr. Snead relies are confidential, and  
 Microsoft takes precautions to keep them secure and confidential. "Microsoft takes even

1 more extensive steps to protect its source code, which it makes available to employees only  
 2 on a need to know basis.” Del Amo Casado Decl. ¶ 12. For any software company, source  
 3 code comprises the single most important asset, and source code derives its value not only  
 4 from its functionality but also from its confidentiality. *Id.* The source code for Windows  
 5 Phone 7 location services, which Mr. Snead discusses, would be “exceptionally valuable” to  
 6 any competitor seeking to learn how Microsoft’s software handles location requests. *Id.*

7 For these reasons, Microsoft asks the Court to keep sealed those portions of Mr.  
 8 Snead’s Report that attach, or discuss with specificity, Microsoft’s specifications and source  
 9 code. But many passages in the Snead Report consist of general descriptions of how  
 10 Windows Phone 7 functions, which could be unsealed without jeopardizing Microsoft’s  
 11 competitive interests. Del Amo Casado Decl. ¶ 13. Microsoft therefore proposes that  
 12 Plaintiff file with the Court for public record a redacted version of the Snead Report, which  
 13 obscures only material disclosing information about Microsoft’s highly confidential and  
 14 competitively sensitive source code, as well as other material disclosing specific and therefore  
 15 competitively sensitive information about how Windows Phone 7 resolves location requests.  
 16 The del Amo Casado Declaration attaches as Exhibit A, filed under seal, a version of the  
 17 Snead Report highlighting the material Microsoft asks the Court to maintain under seal. *Id.*

18 ***Email String Concerning Collection of Identifying Data.*** One of Plaintiff’s exhibits  
 19 is an email string containing a discussion among Microsoft employees about fields of data  
 20 collected through Microsoft’s location services in connection with Windows Phone 7, plans  
 21 for location services changes in Windows Phone 7.5, and possible short-term changes in data  
 22 collection and retention before the Windows Phone 7.5 release. Del Amo Casado Decl. ¶ 9;  
 23 *see* Balabanian Decl., Ex. J [Dkt. No. 72-20]. This email became the basis for two fixes  
 24 Microsoft implemented to improve its already robust protection of user privacy. Del Amo  
 25 Casado Decl. ¶ 9.

26 Microsoft does not believe this email string contains any competitively sensitive  
 27 material. Accordingly, it agrees Exhibit J [Dkt. 72-20] may be filed for public record.

1       ***Excerpts of Deposition Testimony.*** The Balabanian Declaration attaches excerpts of  
 2 deposition testimony of Microsoft employees regarding various issues. Del Amo Casado  
 3 Decl. ¶ 14; *see* Balabanian Decl., Exs. E, F, I & O [Dkt. Nos. 72-15 – 72-16, 72-25].  
 4 Although some of this testimony relates to highly confidential trade secrets, some can be  
 5 unsealed and filed for public record.

6       Microsoft has no objection to unsealing Exhibit E to the Balabanian Declaration [Dkt.  
 7 72-15], which includes excerpts from the deposition of Sandeep Deo, describing Microsoft's  
 8 Orion service, which uses Microsoft's servers and location database to provide location  
 9 services to Windows Phone users. Del Amo Casado Decl. ¶ 15. Because Mr. Deo's  
 10 testimony addresses these topics generally, it does not raise competitively sensitive issues. *Id.*  
 11 For similar reasons, Microsoft has no objection to unsealing excerpts from the deposition of  
 12 Shamik Bandyopadhyay, attached as Exhibit O to the Balabanian Declaration [Dkt. 72-25].  
 13 Mr. Bandyopadhyay's testimony primarily addresses functions and user interfaces visible to  
 14 the public, which present no confidential or competitive issues. Del Amo Casado Decl. ¶ 18.

15       On the other hand, excerpts from the depositions of Cristina del Amo Casado and  
 16 Adam Lydick (Exhibits F and I to the Balabanian Declaration) address highly confidential  
 17 matters that should remain under seal. For example, Ms. del Amo Casado's testimony  
 18 focuses on the location framework in Windows Phone 7, including its interaction with  
 19 applications that call for location and with the Orion service, which provides location services  
 20 when location framework cannot infer location from information stored on the device. Del  
 21 Amo Casado Decl. ¶ 16. Much of Ms. del Amo Casado's testimony addresses these issues  
 22 generally and can be filed for public record without jeopardizing Microsoft's competitive  
 23 interests. *Id.* But portions of her deposition describe in detail the algorithm used by the  
 24 Windows Phone 7 software to resolve location requests, and that information "goes to the  
 25 core of Microsoft's trade secrets with respect to location services, and it would jeopardize  
 26 Microsoft's competitive interests if this information were made available to competitors." *Id.*  
 27 Other portions of Ms. del Amo Casado's testimony address the length of time a device

1 running Windows Phone 7 retains specific information, which is competitively valuable and  
 2 should therefore be sealed. *Id.*

3 The filed excerpts from the deposition of Adam Lydick, on the other hand, generally  
 4 describe how the Camera application on Windows Phone 7 interacts with the Windows Phone  
 5 7 location framework. Del Amo Casado ¶ 17. Most of Mr. Lydick's testimony discusses  
 6 these issues at such a level of generality that it can be filed for public record without  
 7 jeopardizing competitive interests. But Mr. Lydick's testimony also addresses sensitive  
 8 matters that could not be disclosed without adversely affecting Microsoft's competitive  
 9 interests: (a) highly sensitive source code that Microsoft keeps confidential and has value as a  
 10 trade secret; and (b) the time frame within which Camera makes location calls and the  
 11 expected time for a response. *Id.*

12 Microsoft proposes that Plaintiff file for public record (a) unredacted copies of the  
 13 excerpts from the depositions of Messrs. Deo and Bandyopadhyay, and (b) redacted copies of  
 14 excerpts from the depositions of Ms. del Amo Casado and Mr. Lydick, obscuring the  
 15 information described above. The del Amo Casado Declaration attaches as Exhibits B and C,  
 16 filed under seal, versions of excerpts from Ms. del Amo Casado's and Mr. Lydick's  
 17 depositions, highlighting the material Microsoft asks the Court to maintain under seal. *Id.* ¶¶  
 18 16-17.

19 ***Plaintiff's Class Certification Motion.*** Although Plaintiff's Motion for Class  
 20 Certification [Dkt. 70] cites and describes functional and design specifications, it discusses  
 21 Windows Phone 7's location services at such a high level of generality that Microsoft has no  
 22 objection to filing the unredacted Motion for public record.<sup>1</sup>

23 **2. Public Disclosure of the Information Microsoft Seeks to Keep  
 24 Sealed Would Cause Microsoft Competitive Harm.**

25 The public disclosure of the information Microsoft asks the Court to retain under seal  
 26 would put Microsoft at a competitive disadvantage vis-à-vis its smartphone competitors. Del

27 <sup>1</sup> The Motion for Class Certification contains many factual errors in describing the location  
 framework. Microsoft will address those errors through separate filings.

1 Amo Casado Decl. ¶ 22. Disclosure of the Windows Phone 7 specifications or source code,  
 2 whether through disclosure of the specifications or source code themselves, or through  
 3 deposition testimony discussing those topics, would allow Microsoft's competitors to use that  
 4 information to their advantage, and Microsoft's disadvantage, in developing and marketing  
 5 their competing smartphone operating systems. *Id.* ¶ 23.

6 For similar reasons, Judge Robart in *Microsoft Corp. v. Motorola, Inc.*, 2012 WL  
 7 5476846 (W.D. Wash. Nov. 12, 2012), sealed Microsoft's "confidential source code" and  
 8 "proprietary technical product specifications." *Id.* at \*2. As Judge Robart explained, "source  
 9 code is undoubtably[sic] a trade secret." *Id.* (quoting *Agency Solutions.com, LLC v. TriZetto*  
 10 *Group, Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011) (alteration in original)). And in  
 11 *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2012 U.S. Dist. LEXIS 113132 (N.D. Cal., Aug. 9,  
 12 2012), the court likewise granted a motion to seal "source code, Product Specification, and  
 13 Detailed Design Description" documents, finding "all constitute trade secrets" under Ninth  
 14 Circuit law. *Id.* at \*52. Among other things, the material in *Apple*—like the material  
 15 Microsoft seeks to seal here—included confidential "algorithms" as well as design documents  
 16 showing "the functions, input and output variables, and data structures used." *Id.*

17 In short, Microsoft seeks to seal only the types of documents that courts regularly  
 18 shield as competitively sensitive. At the same time, Microsoft has no objection to public  
 19 filing of documents that describe generally the functions in dispute.

### 20 III. CONCLUSION

21 Microsoft has satisfied both the "good cause" and the "compelling reasons" standards  
 22 for the limited sealing of court filings it seeks here. Microsoft's Proposed Order, lodged  
 23 contemporaneously with this Response, details the materials the Clerk should unseal, as well  
 24 as the materials Plaintiff should re-file for public record with limited redactions as set forth in  
 25 the highlighted exhibits to the del Amo Casado Declaration. The functional and design  
 26 specifications (Balabanian Decl., Exs. A, B, C, D-B-1—B-8, G, H & N [Dkt. Nos. 72-1 – 72-  
 27

1 3, 72-7 – 72-14, 72-17 – 72-18, 72-24; Dkt. Nos. 74, 75, 77 (“corrected” Exhibits A, B, and  
2 N)]) should remain under seal in their entirety.

3 RESPECTFULLY SUBMITTED this 21st day of August 2013.

4  
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8

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 21<sup>st</sup> day of August, 2013.

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